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NO.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR J. MIER, an individual,

Petitioner,

vs.

GLEN W. VAN DYKE, in his capacity as Adjutant General of the Arizona State Army National Guard; **TOGO D. WEST, JR.**, in his capacity as Secretary of the Army,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Title VII, 42 U.S.C. § 2000e, protects the civil rights of National Guard technicians.

2. Whether racial discrimination and civil rights violations by the National Guard against a civilian technician are beyond judicial remedy under the justiciability doctrine.

PARTIES TO THE PROCEEDING

The parties before the Ninth Circuit Court of Appeals were the plaintiff, Arthur J. Mier, an hispanic civil service technician in the Arizona State Army National Guard (hereinafter "AANG"); and the defendants, Donald L. Owens,[1] in his capacity as Adjutant General of the AANG, and Togo D. West, Jr., in his capacity as Secretary of the Army.[2]

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[1]Glen W. Van Dyke is substituted for his predecessor Donald L. Owens, as Adjutant General of the AANG, pursuant to Sup. Ct. R. 35.3.

[2]Togo D. West, Jr., was substituted for his predecessor, Michael P.W. Stone, who was an original defendant in the case below, pursuant to Fed. R. App. P. 43(c)(1).

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REPORTS OF OPINIONS*

Arthur J. Mier v. Donald L. Owens, et al., United St es District Court, District of Arizona, No. CIV-92-0745-PHX-PGR (1993).**

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*Reproduced in Appendix.
**Not published.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The opinion of the Ninth Circuit Court of Appeals sought to be reviewed herein was entered on June 9, 1995.

2. Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied on August 24, 1995.

3. Jurisdiction to review the judgment by writ of certiorari is based on 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED*

Federal Statutes

5 U.S.C. § 102

5 U.S.C. § 7511(b)

28 U.S.C. §§ 1331 and 1346

32 U.S.C. § 101(2) - (4)

32 U.S.C. § 101(12)

32 U.S.C. § 101(19)

32 U.S.C. § 709

32 U.S.C. § 709(a)

32 U.S.C. § 709(a)(2)

32 U.S.C. § 709(b)

32 U.S.C. § 709(d)

32 U.S.C. § 709(f)

42 U.S.C. § 2000e

42 U.S.C. § 2000e-3

42 U.S.C. § 2000e-5

42 U.S.C. § 2000e-16

42 U.S.C. § 2000e-16(a)

*Reprinted in the Appendix.

STATEMENT OF THE CASE

Arthur J. Mier (hereinafter "Mier") is an hispanic civil service technician[3] who has served in the Arizona Army National Guard (hereinafter "AANG") for over twenty-three years. As a civil service technician, Mier serves both in a military capacity, as a commissioned officer not on active duty,[4] and in a civilian capacity, as a full time Supply Management Officer. Mier's primary role is civilian in nature. As a Supply Management Officer, he is responsible for the maintenance, repair and provision of all supplies issued to the AANG.[5] As a condition of holding the civilian position, Mier is required to be a member of the AANG, fulfill the requisite obligations and responsibilities as an officer, and hold the military grade commensurate with his civil service position.[6]

In 1986, Mier filed an Equal Employment Opportunity ("EEO") complaint with the AANG alleging discrimination based on his race, color and national origin. He prevailed on that complaint. Since that time, ranking officers in the AANG (collectively, for purposes of this

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[3]32 U.S.C. § 709(a) defines Mier's position as a "technician," and 32 U.S.C. § 709(d) states that as a technician, Mier is both an employee of the Army and an employee of the United States.

[4]32 U.S.C. § 101(12) defines "active duty" as full-time duty in the active military service of the United States. Section 101(19) defines "full-time National Guard duty" as training or other duty other than inactive duty, performed by a member of the Army National Guard of the United States.

[5]*See* 32 U.S.C. § 709(a)(2).

[6]32 U.S.C. § 709(b).

Petition, all discriminating officers are encompassed by reference to "AANG") have continued their discrimination and retaliated against Mier for filing the 1986 complaint. The AANG's retaliation and general harassment, prompted Mier to file a second EEO complaint on August 14, 1991 for discriminatory retaliation, on the grounds that the AANG (1) failed to complete required performance appraisals, (2) subjected him to unwarranted investigations based on his civilian job performance and duties, (3) denied him a promotion to the rank of Major, and (4) initiated a groundless proceeding to withdraw his federal recognition.[7] After Mier exhausted his administrative remedies, he instituted the current litigation.

Mier filed his complaint in the United States District Court for the District of Arizona on April 17, 1992. Jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and 1346, as well as 42 U.S.C. §§ 2000e-5 and 2000e-16, because Mier's claims arose under federal law and involved the United States or an agency or department thereof as a defendant. The defendants filed their answer on July 2, 1992. On August 10, 1992, defendants filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be

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[7]"Federal recognition is the acknowledgement by the Federal Government that an officer [of the state militia] appointed, promoted, or transferred to an authorized grade or position vacancy in the Army National Guard meets the prescribed laws and regulation governing the action. National Guard Regulation 600-100, Par. 1-3(b). The loss of federal recognition means that the officer no longer participates in federally-paid duty status, which includes activities such as drills, annual training, or service schools at any cost to the federal government, nor may he be called into active federal service." *Frey v. California*, 982 F.2d 399, 400 n.3 (9th Cir. 1993), *cert. denied*, 61 U.S.L.W. 3852 (1993).

granted. Mier filed his response on September 15, 1992. Defendants filed their reply memorandum on September 30, 1992, and a motion to supplement, on March 2, 1993. The district court entered an order granting defendants' motion to supplement on March 3, 1993. On April 12, 1993, the Court granted defendants' motion to dismiss and ordered that the complaint be dismissed in its entirety. (Appendix, pp. A-15 through A-17) Mier timely filed a notice of appeal on May 5, 1993.

The Ninth Circuit Court of Appeals, with a divided panel, affirmed the dismissal. Its opinion was filed on June 9, 1995. (Appendix, pp. A-3 through A-14) A timely petition for rehearing and suggestion for rehearing *en banc* were filed with the Ninth Circuit on July 24, 1995. The Court denied a rehearing by its order dated August 24, 1995. (Appendix, pp. A-1 through A-2)

Although the nature and extent of the retaliatory and discriminatory actions against Mier by officers of the AANG are egregious and relevant, a detailed recitation[8] of those actions is not critical to this Court's resolution of the conflict among the circuit courts and settlement of the issues as to whether discrimination and civil rights violations by the National Guard against its civilian employees are within the scope of Title VII and justiciable.

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[8]The specific acts of retaliation and discrimination are set forth in the Brief of Plaintiff/Appellant before the Ninth Circuit.

ARGUMENT

We ask this Court to grant this Petition because the case presents two issues of first impression: (1) whether Title VII, 42 U.S.C. § 2000e, applies to National Guard technicians, and (2) whether a National Guard technician's civil rights claims under 42 U.S.C. § 2000e are justiciable.[9] With regard to the first issue, the Ninth Circuit, in affirming the lower court's action, found that Title VII did apply to National Guard technicians, but the it employed a test that unduly and prejudicially narrows the circumstances in which Title VII applies. With respect to the second issue, the Ninth Circuit found that the actions about which Mier complained were "integrally related to the military structure" and, therefore, nonjusticiable, a holding that is inconsistent with the purpose and history of Title VII.

In addition, the circuit courts have addressed these issues and reached conflicting results. For example, as discussed *infra*, the Eighth, Ninth, Tenth, and Eleventh Circuits all apply Title VII differently to National Guard technicians. One circuit refuses to apply Title VII at all. With regard to the justiciability issue, the circuits are divided. Some have not squarely addressed the issue of the reviewability of a National Guard technician's claims under Title VII. Of those that have addressed the issue, some have determined such claims to be reviewable, while others have refused to allow such claims. In addition, some circuits have found all claims made by military personnel to be nonjusticiable, while others have deemed claims for

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[9]For the current budget year it is projected that there will be a total of 63,528 people employed as military (civilian) technicians in the Army Reserve, Air Force Reserve, Army National Guard and Air National Guard. 141 Cong. Rec. H9466 (daily ed. Sept. 25, 1995).

injunctive or other equitable relief to be justiciable. The lower courts have each applied their own interpretations of this Court's decision in *Chappell v. Wallace* and devised their own standards for determining justiciability. For all of these reasons, Petitioner respectfully requests that the Court accept review of this case.

FEDERAL COURTS SHOULD APPLY TITLE VII TO PROTECT THE CIVIL RIGHTS OF NATIONAL GUARD TECHNICIANS

A. The Circuit Courts Inconsistently Apply Title VII to National Guard Technicians.

There are instances, in both the circuit and district courts, where Title VII has been readily applied to technicians, and, in some cases, even to full-fledged members of the military. Regrettably, the Supreme Court has not addressed the issue in the National Guard context, and the circuit courts are anything but consistent in their opinions and holdings.

This case illustrates the Ninth Circuit's gradual acceptance and affirmation of the application of Title VII to National Guard technicians. *See Mier v. Owens*, 57 F.3d 747, 748-50 (9th Cir. 1995). Other circuits have not been so generous. The Eighth Circuit has noted that "'neither Title VII nor its standards are applicable to persons who enlist or apply for enlistment in any of the armed forces of the United States.' [Citation omitted]. We do not see any significant distinction, for Title VII purposes, between a member of the Army or Air Force and a member of . . . the National Guard." *Taylor v. Jones*, 653 F.2d 1193, 1200

(8th Cir. 1981).[10] The Eleventh Circuit, while leaving some question as to the scope of its holding, declared that "a member of the National Guard [] is not an employee of the state of Alabama for purposes of Title VII." *Stinson v. Hornsby*, 821 F.2d 1537, 1539-40 (11th Cir. 1987), *cert. denied*, 488 U.S. 959 (1988). The court alluded to a balancing test to determine whether a technician is more military personnel or state employee for purposes of applying Title VII. *Id.* at 1540, 1541. Such a test, if the court was employing it, is entirely inconsistent with the approach and analysis taken by the Ninth Circuit in *Mier*. *See Mier*, 57 F.3d at 748. ("We conclude that Title VII applies to Guard technicians except when they challenge personnel actions integrally related to the military's unique structure." *Id.*) The Eleventh Circuit focused on the role of the technician; whereas the Ninth Circuit evaluated the nature of the actions taken against Mier.

The Tenth Circuit appears to be more lenient in allowing a Title VII action by a technician, even when the alleged discrimination is based on "officer efficiency ratings" and arguably a failure to promote. *See Thornton v. Coffey*, 618 F.2d 686 (10th Cir. 1980). In this sense, it more closely parallels the Ninth Circuit. But regardless of how closely one circuit parallels another, there are clear differences in the law as they apply it. There is a need for uniformity, and the issue should be settled by the Supreme Court.

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[10]The Eighth Circuit appeared willing to recognize a Title VII violation with respect to the plaintiff's exclusively civilian job conditions. *But see id.* at 1201 n.6.

The unique circumstances of National Guard technicians attempting to remedy discrimination was illustrated in *Hunter v. Stetson*, 444 F. Supp. 238 (E.D.N.Y. 1977). The district court alertly observed that the defendants could exploit their dual civilian/military status and attempt to shield their wrongful conduct by arguing that it was strictly military. The plaintiff, a federal civilian employee, who was also a National Guardsman, brought a Title VII action on the ground that his military rank had been reduced as a reprisal for having participated in proceedings on a discrimination complaint filed against the National Guard by one of its other civilian employees. *Id.* at 238. The court refused to dismiss the complaint on defendants' motion, which was similar in many respects to the motion that was filed in the district court in this case.

> . . . I read the complaint as alleging improper action on the part of plaintiff's *civilian* employers; i.e., exploiting their dual status as plaintiff's military and civilian superiors to pervert the military decision-making process. And this was allegedly done with the intent of furthering goals in the realm of civilian employment: i.e., discouraging the processing of discrimination complaints.
>
> It is the dual status of the Guard's employee-members that presents the difficult questions on this motion. . . .
>
> However, . . . the complaint states a cause of action cognizable under Title VII. Plaintiff contends that the act which precipitated a reduction in his military rank . . . was committed within the scope of his civilian employment, and that it is only by

> virtue of the fact that his superiors in the Guard wear two hats that they were able to mete out punishment in the form of a reduction in military rank. . . . Had the retaliation taken place in the civilian sphere, civilian redress would of course have been available to plaintiff.

Id. at 239-240 (emphasis original). *Hunter* illustrates Title VII's applicability to the case at bar, and, more important, it highlights the unique and difficult position in which technicians will remain if this Court does not grant *certiorari* and settle this area of the law.

B. Title VII Applies to National Guard Technicians.

Title VII applies to "[a]ll personnel actions affecting *employees* or applicants for employment (except with regard to aliens employed outside the limits of the United States) *in military departments* as defined in Section 102 of Title 5 . . . ."[11] 42 U.S.C. § 2000e-16(a) (emphasis added). "A technician employed under subsection (a) [of the National Guard Technicians Act] is an *employee of the Department of the Army* or the Department of the Air Force, as the case may be, and an employee of the United States." 32 U.S.C. § 709(d) (emphasis added). Although a technician may be a "member of the National Guard," 32 U.S.C. § 709(b), he

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[11]The military departments are defined as the Department of the Army, Department of the Navy, and Department of the Air Force. 5 U.S.C. § 102.

or she is not necessarily a member of the "armed forces."[12]

Moreover, as employees of a military department, the only standard protections that technicians are not entitled to are spelled out in the statute. "Sections 2108, 3502, 7511 and 7512 of Title 5 do not apply to any person employed under this section." 32 U.S.C. § 709(f). Section 2108 defines veterans and veteran status; section 3502 pertains to the order in which civil service employees will be retained when the work force is reduced; sections 7511 and 7512 relate to certain actions taken against federal employees. If technicians were to be treated as regular military, they would not need to be expressly excluded from these statutes along with members of the foreign service, C.I.A., Postal Service, F.B.I., etc. To hold otherwise would render the statutory language in 32 U.S.C. § 709(f) and 5 U.S.C. § 7511(b) superfluous -- a result discouraged in statutory interpretation. *Astoria Federal S & L Assn. v. Solimino*, 501 U.S. 104, 107 (1991). Furthermore, since Congress specified four specific provisions that did not apply to technicians, it is reasonable to conclude that if Congress had intended for technicians to be deprived the benefits of 42 U.S.C. § 2000e-16, it would have made an express provision to that effect. With respect to *technicians* in the National Guard only, when Congress specified the provisions of federal law that would not apply to them, it did not include Title VII. The omission means that, although traditional members of the armed forces may have to endure harassment and discrimination without judicial recourse, Mier does not.

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[12]The National Guard Act makes the distinction between "armed forces," which "means the Army, Navy, Air Force, Marine Corps and Coast Guard," and "National Guard," which is defined separately from the "armed forces." 32 U.S.C. § 101(2) - (4). Nevertheless, by virtue of section 709(d), a technician remains an *employee of the department*.

C. The Legislative History Demonstrates that Racial Discrimination and Other Civil Rights Violations Against National Guard Technicians Are Within the Scope of Title VII Protection.

When the special status of technicians is recognized, Title VII is clearly applicable, just as it is with respect to any other civilian employee.

> When the instant case was appealed to the Federal Circuit, the intervenor [National Guard Bureau] brought to the attention of the court an uncodified provision of the National Guard Technicians Act that was not considered in *Gordon*:
>
> "Except as provided in this Act and in the amendments made by this Act, and notwithstanding any law, rule, regulation, or decision to the contrary, *the positions of persons employed under section 709 of title 32*, United States Code, existing on the day before the effective date of this Act, and the persons holding those positions on that day, *shall*, on and after that effective date, *be considered to be positions in and employees of the Department of the Army or the Department of the Air Force*, as the case may be, and employees of the United States *to the same extent as other positions in and employees of the Department of the Army or the Department of the Air Force*." Pub. L. No. 90-486, § 3(b), 82 Stat. 755, 757 (1968).
>
> Although the primary concerns prompting the enactment of the 1968 Act

> were the lack of a uniform and adequate retirement and fringe benefit program, and the question of the technicians' legal status under the Federal Tort Claims Act, *the language employed in section 3(b) establishes conclusively that technicians are not to be considered as Federal employees for these purposes only*. Despite the fact that they work for state organizations under the authority of a state official, *technicians must be considered as civilian employees of the Departments of the Army or Air Force who possess all the rights held by other Army and Air Force employees, save those rights specifically denied them in the National Guard Technicians Act*.

Kostan v. Arizona National Guard, 50 M.S.P.R. 182 (1991) (emphasis added). (Appendix, pp. A-65 through A-73) The Board's careful attention to the legislative history is commendable and appropriate in this context when attempting to derive the true legislative intent. *Moorehead v. United States*, 774 F.2d 936, 940 (9th Cir. 1985) ("When interpreting a statute, the court's objective is to ascertain the intent of Congress and to give effect to legislative will.").

The proposition that technicians are protected by Title VII has been accepted by at least one federal court and, as far as counsel can determine, rejected by no court that has considered this portion of the legislative history. *See Mackey v. Stetson*, 18 Empl. Prac. Dec. 8778 (CCH) (W.D.N.C. 1978) ("This action was brought under 42 U.S.C. § 2000e-16 against the Air National Guard, alleging discrimination in the operation of its Charlotte facility. The thrust of the complaint is that defendants' practices with respect to the hiring and promotion of technicians are racially discriminatory. The parties agree that technicians

are employees of the National Guard who must, by virtue of statute (32 U.S.C. § 709), also be commissioned in the National Guard. At the hearing and in their memoranda on the class certification issue, defendants have conceded that technicians are within the class of federal employees protected from race discrimination in employment under 42 U.S.C. § 2000e-16."). (Appendix, pp. A-62 through A-64)

The discussion in *Kostan* thoroughly considers the legislative history of section 709 to determine the true congressional intent with respect to the employment status of technicians. The discussion accurately recites the critical portion of P.L. 90-486 and applies a reasonable and plain interpretation of the language to conclude that National Guard technicians are civilian employees[13] for purposes of Title VII. (Appendix, pp. A-65) The Board's approach is further supported by congressional materials, which indicate that the purpose of the legislation was, in part, "[t]o clarify the technician's legal status which in certain areas has been the subject of conflicting court decisions, especially on the matter of whether technicians are covered under the Federal Tort Claims Act regarding third party actions against the U.S. Government." H.R. Rep. No. 1823, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 3318, 3319. "The technicians, now numbering about 42,000, are full-time civilian employees of the National Guard whose salaries are paid in full by the Federal Government and who must meet all the mental and physical standards as well as professional qualifications prescribed by the military departments." *Id.* The history also reflects that membership in the National Guard is a *condition of* the technicians' *civil employment*, and nothing more. *Id.* The position of "technician" was clearly contemplated a "civil service position[]." *Id.* at 3324.

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[13]This conclusion is also clear from a reading of section 709(d) alone. 32 U.S.C. § 709(d).

Notwithstanding the sensible rationale for allowing Title VII protection for technicians, and the clear legislative history, as a study of Title VII cases in the lower courts demonstrates, without a pronouncement from this Court, the law will continue to be inconsistently applied. Potentially, hundreds of technicians will be left without the meaningful legal recourse to which they are entitled.

D. The Justiciability Doctrine Does Not Preclude a Legal Remedy in this Case.

This Court has never addressed the issue of whether a National Guard technician's Title VII action presents a justiciable controversy.[14] This important question of federal law potentially impacts thousands of people. Although most of the circuits have not addressed the issue in the Title VII context, the circuits have all addressed the justiciability of National Guard technicians' actions generally. The absence of a clear directive from this Court as to a single standard to be applied has created a morass of inconsistent and conflicting opinions. This void should be filled with a reasoned clarion call for uniformity and fairness.

The justiciability doctrine exists to prevent courts from overzealously regulating and interfering in areas traditionally considered to be military in nature. *See Orloff v. Willoughby*, 345 U.S. 83, 94 (1953).[15] The general

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[14]In *Gilligan v. Morgan*, 413 U.S. 1 (1972), the Court did address claims presented by a National Guard technician, but the Court declined to decide the question of justiciability.

[15]*But see Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 769 (7th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3288 (1993) ("Reading *Orloff* to support broad deference to the military ignores the narrow context in which the language is meant to apply. Deference to the military only

(continued...)

rationale for the doctrine is that military matters involve areas of expertise far outside the court's domain. *See Gilligan v. Morgan*, 413 U.S. 1, 10-11 (1973). The doctrine was not, however, conceived as a cloak to prevent courts from reviewing any and all military actions.

Generally, the Supreme Court has expressed an unequivocal willingness to intervene in those instances where there are judicially cognizable injuries. *Laird v. Tatum*, 408 U.S. 1 (1972).

> [W]hen presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in the Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

Id. at 15-16. Further, in *Chappell v. Wallace*, the Court stated:

> This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service. (Citation omitted.)

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[13](...continued)
affected the Supreme Court's judgment as to the merits of Orloff's claim, not the question of whether it should have reviewed the claim at all.").

Chappell, 462 U.S. 296, 304 (1983). This general philosophy should be applied to Mier's case, although he is only viewed as "military" in a very limited context.

The Supreme Court previously has reviewed military personnel policies when constitutional infirmities were alleged. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57 (1981); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973). Although these cases are distinguishable from Petitioner's case, they refute the notion that military or quasi-military decisions are absolutely beyond judicial inquiry.

Controversies between National Guard technicians and the National Guard should be treated differently than ordinary military disputes for the purpose of deciding justiciability. *See Laird v. Tatum*, 408 U.S. 1, 15-16 (1972) (Federal courts are fully empowered to consider claims of injury resulting from intrusion of the military sector into the civilian sector.); *Dunlap v. Tennessee*, 514 F.2d 130, 133 (6th Cir. 1975), *rev'd on other grounds*, 426 U.S. 312 (1975) ("Military" decisions made for non-military reasons, and involving no application of military expertise, may be outside the boundaries of the doctrine of unreviewability.); *Renicker v. Marsh*, 640 F. Supp. 244 (N.D. Ohio 1986) (similar holding). This Court has already stated that the conduct of the National Guard should not be immunized from all judicial scrutiny. *Gilligan v. Morgan*, 413 U.S. 110-11 (1973) ("It should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel.").

Distinguishing the National Guard from the military is further supported by the legislative history of 32 U.S.C.

§ 709 which indicates that Congress intended for technicians to have the same benefits and protections as other civilian employees of the government, with the exception of four limited statutory provisions, which are specifically identified in section 709. The doctrine of justiciability should not be used to circumvent or second-guess this legislative mandate.

1. The Supreme Court Has Not Addressed This Issue.

Historically, the Supreme Court has rendered a handful of opinions which have guided the circuits in determining the justiciability of military disputes; however, the courts have not been entirely successful in gleaning the Court's intention and they have not been uniform in their interpretation or application of the doctrine. *See United States v. Stanley*, 483 U.S. 669, 676 (1987).

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court authorized a suit for damages against federal officials whose actions violated an individual's constitutional rights, even though Congress had not expressly authorized such suits. The Court cautioned, however, that such a remedy will not be available when "special factors counselling hesitation" are present. *Id.* at 396. This rationale also formed the basis of this Court's decision in *Feres v. United States*, 340 U.S. 135 (1950). In *Feres*, this Court held that a soldier may not recover under the Federal Tort Claims Act for injuries which "arise out of or are in the course of activity incident to service." *Id.* at 146. These two cases set the stage for *Chappell v. Wallace*, 462 U.S. 296 (1983).

In *Chappell*, the Supreme Court addressed the issue of whether enlisted military personnel can maintain suits to recover damages from superior officers for injuries sustained

as a result of violations of constitutional rights in the course of military service. This Court held that "the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a Bivens-type remedy against their superior officers." *Id.* at 304. Although it is not controlling in our case since the Court was addressing claims of enlisted Navy personnel, not of a National Guard technician and the claims in *Chappell* were brought pursuant to 42 U.S.C. § 1985, not 42 U.S.C. § 2000e, *Chappell* has led to confusion on the justiciability issue.

The Supreme Court issued two subsequent decisions regarding the justiciability of military disputes. First, in *United States v. Shearer*, 473 U.S. 52 (1985), the Court granted *certiorari* to decide whether the survivor of a serviceman, who was murdered by another serviceman, could recover from the government under the Federal Tort Claims Act for negligently failing to prevent the murder. The Court followed *Feres* and determined that the claim involved the judiciary "in sensitive military affairs at the expense of military discipline and effectiveness." Therefore, it held that the claims must fail. Then, in *United States v. Stanley*, 483 U.S. 669 (1987), the Court accepted review to clarify the circumstances in which courts should decline to permit nonstatutory damages actions for injuries arising out of military service. In this case, the Court provided some guidance to the circuits and advocated using the "incident to service" test of *Feres* because it arguably "provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters." *Id.* at 683. The Court reaffirmed the "special factors" analysis of *Chappell* and ultimately concluded that no Bivens remedy is available for injuries that "arise out of or are in the course of activity incident to service." *Id.* at 684. Although these cases came closest to addressing the issues presented by Mier's case,

they are so factually distinct that they are of limited usefulness in this context.

As a National Guard technician, Mier is in a predominantly civilian position. Existing case law does not dictate that his claims be ignored as non-justiciable. First, almost all of the cases cited above address the claims of full-time enlisted military personnel. The courts' general rationale for deferring to the military and taking a laissez-faire approach is much less compelling in the context of a claim brought by a National Guard technician. The concerns over interfering in matters of military discipline and areas of military expertise do not apply when addressing the claims of a civilian technician working in a civilian capacity. Second, Mier is seeking relief under Title VII, 42 U.S.C. § 2000e, which was not the case in *Bivens*, *Feres*, *Chappell*, *Shearer*, or *Stanley*. This Court has never addressed the justiciability of a Title VII claim brought by a National Guard technician. Finally, Mier seeks monetary damages and equitable relief. While *Bivens* and its progeny dealt with claims for monetary relief, the justiciability of even a military member's claims for equitable relief has never been addressed by this Court.

2. The Circuit Courts Are Divided.

Not only does this case present a novel issue of significant federal importance, but it also provides the Court with an opportunity to resolve the present conflict in the circuits. The case law is replete with inconsistent and confusing doctrine regarding the standard to apply in determining the justiciability of military disputes.

Several years ago, nine of the eleven circuits employed the "*Mindes* test"[16] to determine what constituted

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[16] *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971).

a reviewable controversy.[17] *See Khalsa v. Weinberger*, 779 F.2d 1393, 1396 (9th Cir. 1985), *reaff'd*, 787 F.2d 1288, 1289 n.1 (9th Cir. 1985); *see also* Note, *Judicial Review of Constitutional Claims Against the Military*, 84 Colum.L.Rev. 387, 397, 402 (1984). Since then, the Supreme Court issued *Chappell* and the Court's intended "legal light" has been refracted by the circuits into a myriad of formulations for determining justiciability.

In *Wright v. Park*, 5 F.3d 586 (1st Cir. 1993), the First Circuit held that "*Mindes* has been banished from its homeland" and it adopted a new rule for determining justiciability. *Id.* at 591 n.6. Interpreting *Bivens*, *Chappell* and *Stanley*, the First Circuit concluded that civil rights claims in the military context, including the National Guard, against state officials under 42 U.S.C. § 1983, and under kindred statutes, will be deemed nonjusticiable controversies if the injuries arise out of or are in the course of activity incident to military service. *Id.* at 590-591. The court announced that it was joining several of its sister circuits in adopting this rule. *Id.* at 590 n.6, *citing Maddick v. United States*, 978 F.2d 614, 615 (10th Cir. 1992); *Kitowski v. United States*, 931 F.2d 1526, 1529 (11th Cir. 1991), *cert. denied*, 502 U.S. 938 (1991); *Watson v. Arkansas Nat'l Guard*, 886 F.2d 1004, 1006-1007 (8th Cir. 1989).

It does not appear that the Second Circuit has squarely addressed the issue. However, in *New York v. Federal Labor Rel. Auth.*, 696 F.2d 202 (2d Cir. 1982), the Court accepted for review, without addressing the justiciability issue, the New York National Guard's appeal of an order from the Federal Labor Relations Board, finding that the National Guard had engaged in unfair labor practices

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[17]The Federal Circuit and the Third Circuit elected not to adopt the *Mindes* test. *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1512 (D.C. Cir. 1989); *Dillard v. Brown*, 652 F.2d 316, 323 (3d Cir. 1981).

with regard to civilian technicians by requiring its civilian technicians to wear a military uniform while performing their daily duties as civilians. Also, in *Johnson v. State of New York*, 49 F.3d 75 (2d Cir. 1995), the Second Circuit accepted and reviewed a claim by a New York State National Guard technician under the Age Discrimination in Employment Act and found that the state had discriminated against plaintiff on the basis of his age. These cases illustrate the Second Circuit's willingness to review cases involving dress code and termination decisions, both of which have clear military overtones.

In *Jorden v. National Guard Bureau*, 799 F.2d 99 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987), the Third Circuit considered the issue of whether National Guard officers were susceptible to suits by guardsmen for damages and injunctive relief under 42 U.S.C. § 1983. Relying on *Chappell*, the district court dismissed the action on a Rule 12(b) motion to dismiss. The appellate court found that while the district court was correct in dismissing the claim for damages, it was incorrect in dismissing the claim for injunctive relief or reinstatement.

The *Jorden* Court noted that the majority of courts to consider the question have held that *Chappell* establishes a *per se* prohibition of damages actions against military officers for violations of constitutional rights. *Id.* at 107 (*citing Trerice v. Summons*, 755 F.2d 1081 (4th Cir. 1985); *Martelon v. Temple*, 747 F.2d 1348 (10th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985); *Mollnow v. Carlton*, 716 F.2d 627 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984)). However, the court acknowledged that other courts have disagreed in whole or in part. *Id. Shaw v. Gwatney*, 584 F. Supp. 1357, 1362 (E.D. Ark. 1984) (*Chappell* requires balancing strength of the right and likely degree of interference with the military order for determining whether suit is barred.). *C.f.*, *Brown v. United States*, 739 F.2d 362

(8th Cir. 1984), *cert. denied*, 473 U.S. 904 (1985) (*Chappell* automatically bars damages actions except in rare case in which alleged conduct is entirely unrelated to military mission.). Still other courts that have considered the question have held that *Chappell* leaves open claims for injunctive relief. *Id. See also Ogden v. United States*, 758 F.2d 1168 (7th Cir. 1985); *Gant v. Binder*, 766 F.2d 358 (8th Cir. 1985). Taking a divergent path, the *Jorden* Court ultimately concluded that as a general matter, requests for injunctive relief against the military *are reviewable*. *Jorden*, 799 F.2d at 109 (*citing Dillard v. Brown*, 652 F.2d 316 (3d Cir. 1981)).

The Fourth Circuit, in *Trerice v. Summons*, 755 F.2d 1081 (4th Cir. 1985), affirmed the dismissal of a Navy enlisted man's action for monetary damages under 42 U.S.C. §§ 1983(3) and 1986. The court relied on *Chappell*, but focused on an "intramilitary immunity" and refused to delve into military matters without an overwhelming justification. *Id.* at 1084. The Fourth Circuit also employed the *Mindes* test in *Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991), leaving open to interpretation when and how the Court determines justiciability.

The Fifth Circuit's opinion in *Crawford v. Texas Army Nat'l Guard*, 794 F.2d 1034 (5th Cir. 1986), largely guides its approach to determining justiciability of National Guard-related disputes. In *Crawford*, the court rejected the compensatory and equitable claims of twelve guardsmen. Interestingly, not only was the claim for monetary relief denied, following *Chappell* and *Shearer*, the court denied the claims for injunctive relief, or reinstatement, as well. *Id.*, at 1036-1037. This decision directly conflicts with the Third and Sixth Circuits.

The Sixth Circuit joined the Third Circuit in finding that a National Guard member may be entitled to injunctive

relief in a section 1983 action. *Schultz v. Wellman*, 717 F.2d 301 (6th Cir. 1983). In *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765 (7th Cir. 1993), the Seventh Circuit followed the Fifth Circuit in finding that a claim for injunctive relief under 42 U.S.C. § 1983 was nonjusticiable.

In *Watson v. Arkansas Nat'l Guard*, 886 F.2d 1004 (8th Cir. 1989), the Eighth Circuit rejected *Mindes* as the justiciability test and followed the Fifth Circuit's decision in *Crawford*. The court agreed that under 42 U.S.C. § 1983, neither claims for injunctive nor demands for monetary relief presented a justiciable controversy. However, the court agreed that facial challenges to the constitutionality of a military regulation or statute are justiciable, as are actions seeking judicial review of final agency action. *See Wood v. United States*, 968 F.2d 738, 739-40 (8th Cir. 1992).

In *Mier*, the Ninth Circuit held that Title VII does apply to National Guard technicians but that the actions of which Mier complained were "integrally related to the unique structure of the military" and therefore presented non-justiciable controversies. This test further illustrates the diversity of standards being used by the lower courts when addressing the justiciability issue.

The Tenth Circuit in *Martelon v. Temple*, 747 F.2d 1348 (10th Cir. 1984), agreed that claims for injunctive or monetary relief under 42 U.S.C. § 1983 were non-justiciable. Further, in *Oram v. United States*, 1994 U.S. App. LEXIS 30526, the court found that claims for injunctive and monetary damages under the Federal Tort Claims Act are not justiciable and used the "incident to service" rule originally announced in *Feres*.

In *Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987), *cert. denied*, 488 U.S. 959 (1988), the Eleventh Circuit considered a Title VII claim of a National Guard

technician and, although it ultimately ruled in favor of the National Guard, the court *did consider* one of the claims and did not find it to be unreviewable. More recently, the Eleventh Circuit considered a naval reserve member's claims of due process and claims under the Rehabilitation Act and, although it did not address the district court's finding that Doe's due process claim was unreviewable, it stated that it found nothing objectionable in the district court's application of *Mindes*. *Doe v. Garrett*, 903 F.2d 1455, 1463 (11th Cir. 1990), *cert. denied*, 499 U.S. 904 (1991). Thus, it is unclear when and to what extent the Eleventh Circuit relies on *Mindes*. *Id.*, at 1463 n.15.

In *Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989), the Federal Circuit did not apply *Mindes* or any other test, but under general principles outlined in *Orloff*, *Gilligan* and *Chappell*, declined to review the merits of an Air Force Major's claim for retroactive promotion as nonjusticiable but found the Major's alternative claims for correction of military records to be justiciable.

In determining justiciability, the circuits have interpreted *Chappell* inconsistently and reached a number of divergent conclusions. Some courts have relied on immunity principles, while others have invoked the *Feres* "incident to service" test, the *Chappell* "special factors" test or even the Fifth Circuit's *Mindes* test to bolster their opinions. As it stands now, lower courts must apply their own jurisprudence to determine the justiciability of military claims, especially those seeking injunctive or other equitable relief. The inconsistency in the decisions reached has been compounded when the courts have considered claims of National Guard technicians, who are primarily civilian employees. Finally, *Chappell*'s relevance to a Title VII action is not clear. In sum, this case presents an issue of first impression and one of significant federal importance. The circuits' divergent

interpretations and applications of *Chappell* should further compel this Court to accept review.

E. The Ninth Circuit's Decision Should Be Affirmed in Part and Reversed in Part.

In its Memorandum Decision, a divided panel of the Ninth Circuit affirmed the judgment of the district court, albeit on different grounds. The court held that National Guard technicians hold hybrid positions entailing both civilian and military aspects, and that Title VII coverage of civilians employed by the military encompasses actions brought by National Guard technicians, except when the challenged conduct is "integrally related" to the military's unique structure. (Appendix, pp. A-3 through A-14) To the extent the Ninth Circuit found Title VII applicable, its opinion should be affirmed. The court concluded, however, that the specific acts about which Mier complained were integrally related to the military's structure and, therefore, not subject to judicial review and remedy. This aspect of the opinion should be reversed.

In addition, the Ninth Circuit construed the allegations of the complaint too narrowly. The standard of notice pleading is extremely liberal. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). On appeal, the allegations in the complaint must be taken as true and reviewed in the light most favorable to the non-moving party. *Love v. United States*, 915 F.2d at 1245. The Court must draw all reasonable inferences in favor of the plaintiff. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Dismissal is appropriate only when it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. A "court may dismiss a complaint only if it is clear that no relief could be granted

under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

In this case, the district court dismissed the complaint before the facts and evidence could be presented. Although Mier alleged certain discriminatory acts which had a military connection and had an impact on his civilian career, the claims are based, in part, on the fact that he was suspended from his civilian employment. Further, not all of Mier's damages have been caused by purely military actions. As Judge Reinhardt noted in his dissent:

> . . . indeed, he based certain of his claims upon discrimination against him as a *civilian* employee. Moreover, although his specific allegations suggest that two of his claims may rest, in part, upon military decisions, a plaintiff is not required to allege every factual basis for all of his claims at such an early stage in the proceedings. (Emphasis in original.)

(Appendix, p. A-14)

The Supreme Court in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), held that when ruling on Rule 12(b) motions to dismiss a judge "must presume[ ] that general allegations *embrace the specific facts* that are necessary to support the claim." *Id.* (emphasis added). Contrary to well-established law, in this case, the Ninth Circuit did not view the discrimination or retaliation claims in a light most favorable to Mier. The court read the general allegations too narrowly and improperly affirmed the district court's decision.

The Memorandum Decision sets forth new parameters for the application of Title VII to uniformed members of the National Guard. The Panel clarifies the protection of civil rights laws for National Guard technicians.[18] However, its decision is inconsistent with other opinions. *See, e.g., Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981); *Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987), *cert. denied*, 488 U.S. 959 (1988); *Becker v. Rice*, 827 F. Supp. 589 (W.D. Ark. 1993).

The Ninth Circuit itself arguably has issued a number of contrary and even conflicting opinions on this topic. Generally, the Ninth Circuit has not applied Title VII to uniformed members of the National Guard. *See Frey v. California*, 982 F.2d 399 (9th Cir. 1993), *cert. denied*, 61 U.S.L.W. 3852 (1993); *Helm v. State of California*, 722 F.2d 507 (9th Cir. 1983); *Gonzalez v. Department of the Army*, 718 F.2d 926 (9th Cir. 1983); *Sebra v. Neville*, 801 F.2d 1135 (9th Cir. 1986); *Christoffersen v. Washington State Air Nat'l Guard*, 855 F.2d 1437 (9th Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989). However, the Ninth Circuit has, on occasion, entertained Title VII actions of military personnel and upheld their claims. *See, e.g., Bledsoe v. Webb*, 839 F.2d 1357 (9th Cir. 1988); *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991). These apparent conflicts within the circuit provide additional support for granting this Petition for Certiorari.

CONCLUSION

The Supreme Court should review the Ninth Circuit's opinion because Title VII, 42 U.S.C. § 2000e, is an

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[18]Mier contends that the Ninth Circuit's test is too limited and is subject to easy manipulation by the perpetrators who will always be able to find a military reason for the actions taken due to the hybrid nature of a National Guard technician's position.

important and widely used federal statute that has broad implications for individuals across the country. The decision below expands the application of Title VII to uniformed members of the National Guard, and further confuses the law in this area. Due to the number of individuals potentially affected by the Court's ruling and its uncontested "national" application, the Court should review the Ninth Circuit's decision.

This Court should resolve the conflict that currently exists among the circuits and even within the Ninth Circuit with respect to the applicability of Title VII and justiciability by providing the guidance necessary to ensure consistent application of federal law. Civil rights protection should be available to National Guard technicians, whose jobs are predominantly civil in nature. And, actions speciously cloaked in military garb should not be allowed to defeat fundamental rights. Such was not the intent of Congress and it should not be the effect of this Court's decision.

For these reasons, Petitioner respectfully urges this Court to grant his Petition.

RESPECTFULLY SUBMITTED this 21ST day of November, 1995.

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